

Spring 2001

Confusing Communications – Analyzing South Carolina's Stance on Ex Parte Communication with Former Employees

Sharyn M. Epley

Follow this and additional works at: <https://scholarcommons.sc.edu/sclr>



Part of the [Law Commons](#)

Recommended Citation

Sharyn M. Epley, Confusing Communications – Analyzing South Carolina's Stance on Ex Parte Communication with Former Employees, 52 S. C. L. Rev. 775 (2001).

This Note is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact dillarda@mailbox.sc.edu.

Epley: Confusing Communications -- Analyzing South Carolina's Stance on
**CONFUSING COMMUNICATIONS—ANALYZING
SOUTH CAROLINA’S STANCE ON EX PARTE
COMMUNICATION WITH FORMER EMPLOYEES**

I. INTRODUCTION

As an attorney, new clients come into your office every day eager for you to listen, ask questions, give advice, and hopefully agree to represent them. So one day a potential client walks into your office and tells you that two months ago she slipped and fell on the freshly waxed floor in the deli department of the local branch of a national supermarket. At first she thought that she was fine, but a recent visit to the doctor revealed that the fall re-aggravated an old back injury, resulting in the need for extensive doctor’s care and medication. Because you are a responsible member of the bar, before filing suit you take it upon yourself to fully investigate the matter to eliminate the risk of possible sanctions for bringing a frivolous law suit.¹ When you go to the supermarket, you learn that during the past two months the deli attendant who waxed the floor, the delicatessen supervisor, and the store manager on duty the day of your client’s accident have left the employment of the supermarket chain. Unfortunately, these individuals are the precise employees with whom you need to speak in your investigation. New questions now arise concerning these potential *ex parte* communications because the employees with whom you need to speak are all now *former* employees of the grocery store. Your new client is in physical and financial pain, but you do not want to risk partaking in an unethical investigation or using communication techniques that violate the rules of professional conduct outlined in the South Carolina Rules of Court.²

Taking into consideration all of these factors, how do you proceed with your investigation? Is it necessary to contact these employees through the supermarket’s counsel? Should you investigate to see if these employees have their own private counsel? Does it make a difference if the former employee previously held an upper-level position? When you finally do get to talk to these employees, how should you proceed? If you break any of the professional rules of conduct, are you subject to disciplinary action?

This Comment provides attorneys working in South Carolina with a much needed roadmap on how to approach these situations. Part II starts with the history of applicable ethics and evidence rules and then examines ethics opinions and case law concerning *ex parte* communications with former employees. Part III focuses on South Carolina ethics opinions and case law.

1. See S.C. APP. CT. R. 407, R. 3.1; S.C. R. CIV. P. 11 (providing that the court may enforce sanctions if the movant fails to make a good faith effort to resolve the dispute); S.C. CODE ANN. § 15-36-10 to -50 (West Supp. 1999) (South Carolina Frivolous Civil Proceedings Sanctions Act).

2. S.C. APP. CT. R. 407.

Finally, Part IV of this Comment analyzes the current situation concerning ex parte communications within South Carolina and gives attorneys guidance on how to conduct a proper ex parte communication.

II. ABA AND STATE ETHICS AND EVIDENCE RULES AND RULINGS

A. *ABA and South Carolina Ethics and Evidence Rules*

1. *ABA Provisions*

The American Bar Association (ABA) has always placed a high priority on protecting parties from communication with the opposing party's counsel.³ The ethical prohibition against such communications stems from a treatise wherein David Hoffman expounded on the ethical prohibition against conversing with the opposing attorney's client.⁴ Professional Ethics Canon 9, enacted in 1908, included the requirement that lawyers should not "communicate upon the subjects of controversy with a party represented by counsel; much less should [attorneys] undertake to negotiate or compromise the matter with, but should deal only with his counsel."⁵ In 1969 the American Bar Association adopted the *Model Code of Professional Responsibility*, which superseded the 1908 Canons.⁶ The Model Code's Disciplinary Rule 7-104 stated that a lawyer should not "[c]ommunicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so."⁷ Later, when the ABA adopted the *Model Rules of Professional Conduct*, the ABA adhered to most of the original language of DR 7-104 and incorporated it into the new Model Rule 4.2.⁸

2. *South Carolina's Appellate Court Rule 4.2*

South Carolina's version of Model Rule 4.2 provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the

3. See generally MODEL CODE OF PROF'L RESPONSIBILITY Canon 9 (1996) (stating the "public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer").

4. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 396 (1995) (quoting Hoffman's treatise and stating that witnesses should not communicate with opposing counsel).

5. MODEL CODE OF PROF'L RESPONSIBILITY Canon 9 (1996).

6. See ABA Comm. on Ethics and Prof. Responsibility, Formal Op. 396 (1995).

7. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-104(A)(1) (1996).

8. See MODEL RULES OF PROF'L CONDUCT R. 4.2 (2000); see also ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 396 (1995) (noting that the Model Code's language closely resembles the Model Rules's language).

matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.”⁹ Rule 4.2 does not prohibit communications regarding matters not involved in the current dispute, nor does it prohibit communications that have independent justification.¹⁰ However, the comment to Rule 4.2 prohibits communications with an organization’s managers or any other personnel whose actions or “statement[s] may constitute an admission on the part of the organization.”¹¹ The comment also states that the “Rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.”¹² In circumstances such as the one outlined in the introduction of this Comment, where lawyers need to speak with former employees, do all former employees speak and act on behalf of the organization? Specifically, can a former manager’s statements and actions constitute an admission of the company? How can an employee who no longer works for the company still speak for or impute the company? Certainly, while employees work for an organization they enjoy the benefits of having the protection and representation of the company’s counsel. The law is quite clear regarding current employees: Ex parte communications are forbidden.¹³ However, it is not clear whether former employees are presumed to speak on behalf of the corporation.¹⁴ Once an employee leaves or is dismissed from a company, does that employee still enjoy the company’s counsel? The uncertain and unclear language of the comment to Rule 4.2 necessarily leads to problems in applying Rule 4.2 to former employees. Thus, the question arises whether the prohibitions outlined in Rule 4.2 apply to all employees or to only a company’s current employees.

The answer to the question is important because an attorney who violates the *Rules of Professional Conduct* may suffer serious repercussions.¹⁵ For instance, the violating attorney may be removed from the case.¹⁶ An attorney’s removal will cost both the attorney and the client valuable time and money. The judge may also choose to remedy a Rule 4.2 violation by ordering the suppression of the ex parte statements.¹⁷ The suppression of these statements

9. S.C. App. Ct. R. 407, R. 4.2.

10. S.C. APP. CT. R. 407, R. 4.2, cmt. For example, the official comment to Rule 4.2 provides that in an action concerning a government agency and a private party, the lawyer may communicate “with nonlawyer representatives of the other regarding a separate matter.” *Id.* In this example, the comment also provides that an independently justified communication could occur between the party and other government officials. *Id.*

11. *Id.*

12. *Id.*

13. *See id.*; *see also* S.C. Bar Ethics Adv. Comm., Formal Op. 25 (1994).

14. *See* S.C. App. Ct. R. 407, R. 4.2 cmt.

15. These repercussions include, but are not limited to, disciplinary action, suppression of the ex parte statements, and removal of the violating attorney from the case. *See Goldston v. Gen. Motors Acceptance Corp.*, No. 93-CP-26-740, slip op. at 13 (S.C. Ct. Com. Pl. July 14, 1995).

16. *See id.*

17. *See id.* at 21.

will place the client's case in peril as important testimony will not be admitted into evidence. Thus, it is important for attorneys to know exactly to whom they may speak without placing their client's case, their reputation, and their law practice in jeopardy.

3. *South Carolina Rule of Evidence 801(d)(2)*

In addition to the prohibitions provided by Rule 4.2, South Carolina Rule of Evidence 801(d)(2) also affects an attorney's ability to communicate with a company's former employees.¹⁸ As applied to situations concerning ex parte communications with former employees, Evidence Rule 801 addresses a definitional problem, rather than a hearsay problem, as the Rule seems to indicate.¹⁹ Rule 801(d)(2) delineates which former employees can impute the corporation.²⁰

Many states' laws provide that no employee may make an admission on behalf of the corporation, unless that employee was authorized to make that communication.²¹ Therefore, former employees that were low-level employees and nonspeaking agents may not impute the organization.²² However, 801(d)(2)(D) provides that a statement by "the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship" is not hearsay and may be imputed to the organization.²³ Therefore, the rule specifically provides that only statements made by current employees during the existence of the employment relationship, concerning matters within the scope of employment, may be found to be binding admissions imputable to the company.²⁴ Stated simply, Rule 801(d)(2)(D) provides that a former employee cannot impute his former employer.²⁵

A recent South Carolina ethics opinion concerning ex parte communications with former employees favorably cited Rule 801 and held that a former employee's statements could not constitute a binding admission on behalf of the organization.²⁶ This long-awaited interpretation of Rule 801 should impact Rule 4.2 because it undermines the applicability of the Rules to a company's former employees.

18. See S.C. R. EVID. 801(d)(2).

19. See NATHAN M. CRYSTAL, PROFESSIONAL RESPONSIBILITY PROBLEMS OF PRACTICE AND THE PROFESSION 378-79 (2d ed. 2000).

20. See S.C. R. EVID. 801(d)(2).

21. See CRYSTAL, *supra* note 19, at 378.

22. *Id.*

23. S.C. R. EVID. 801(d)(2)(D).

24. CRYSTAL, *supra* note 19, at 379.

25. *Id.*

26. S.C. Bar Ethics Adv. Comm., Formal Op. 19 (1998).

B. ABA Ethics Opinions

Unlike the South Carolina Bar Ethics Advisory Committee, the ABA Committee on Ethics and Professional Responsibility explicitly permits ex parte communications with former employees and has clearly stated that “[t]he prohibition of Rule 4.2 with respect to contacts by a lawyer with employees of an opposing corporate party does not extend to former employees of that party.”²⁷ In the 1991 opinion, the ABA first examined Rule 4.2 and held that corporate entities are embraced by the term “party” as stated in the Rule and the official comment.²⁸ Rule 4.2 stands to “‘preserv[e] the proper functioning of the legal system and shield[] the adverse party from improper approaches.’”²⁹ Thus, the issue becomes whether former employees of the adverse corporation are members of the corporate party that need shielding.

In addressing this issue, the ABA Committee went straight to the source, the text of Rule 4.2, and held:

While . . . persuasive policy arguments can be and have been made for extending the ambit of Model Rule 4.2 to cover some former corporate employers, the fact remains that the text of the Rule does not do so and the comment gives no basis for concluding that such coverage was intended.³⁰

The Committee also expressed its reluctance to extend Rule 4.2 to cover former employees when “the effect . . . is to inhibit the acquisition of information about one’s case.”³¹ The ABA realized that prohibiting all ex parte communications would serve only to hinder the adversarial process and the quest for truth.³² Finally, the opinion stressed the need for those lawyers making ex parte communications to protect the former employee’s attorney-client privilege and comply with the requirements of Rule 4.3.³³ Therefore, a lawyer representing a client opposing a corporate party may freely communicate about the current action with the corporate party’s former employees without approval from corporate counsel.³⁴

In 1995, the ABA further expanded its view on this topic in a lengthy opinion that discussed the purpose and varied applications of Rule 4.2.³⁵ In the

27. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 359 (1991).

28. *Id.*

29. *Id.* (citing ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 108 (1934)).

30. *Id.*

31. *Id.*

32. *Id.*

33. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 359 (1991); *see also* MODEL RULES OF PROF’L CONDUCT R. 4.3 (2000) (directing a lawyer’s actions when dealing with unrepresented persons and stating that the attorney-client privilege is the privilege of the employer not the employee).

34. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 359 (1991).

35. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 396 (1995).

opinion, the ABA reaffirmed its 1991 opinion and again stated that Rule 4.2 permits ex parte contact with former employees of a represented corporation.³⁶ The 1995 opinion also remarked that the purpose of Rule 4.2 is not to protect the revelation of damaging facts uncovered in an investigation of a case, but rather to protect the attorney-client privilege.³⁷

C. Recent Ethics Opinions from Other States

A majority of states have supported the 1991 ABA Ethics Opinion, following the general trend of allowing ex parte communications with an opposing corporate party's former employees.³⁸ For example, a recent North Carolina ethics opinion permitted ex parte communications with all former employees who were not privy to any privileged communications related to the current action.³⁹ The opinion explicitly permits the contact because "the plaintiff's counsel [will] not interfere with [the] Corporation's relationship with its lawyer nor will it result in the disclosure of privileged client-lawyer communications regarding the representation."⁴⁰ Additionally, North Carolina's rule prohibiting communications with represented persons would not be "enhanced by extending the prohibition to former employees who, during the time of their employment, did not participate substantively in the representation of the organization."⁴¹

Virginia embraced the 1991 ABA opinion and permits communications with former employees because while a "corporation acts through its employees," a corporation cannot act through its former employees who no longer work for the corporation and can no longer bind the corporation.⁴² Florida also interpreted its version of Rule 4.2 to permit all communications with former employees who have not maintained ties to the corporation and have not sought representation or protection from the corporation's legal counsel, reasoning that "Rule 4-4.2 cannot reasonably be construed as requiring a lawyer to obtain permission of a corporate party's attorney in order to communicate with former managers or other former employees of the corporation."⁴³ Furthermore, the Florida Ethics Committee noted that both

36. *Id.*

37. *Id.*

38. See, e.g., Alaska Bar Ass'n. Ethics Comm., Op. No. 1, 1991 WL 786532 (1991); Ohio Bd. of Comm'rs on Grievances and Discipline, Op. No. 1, 1996 WL 92872 (1996); Or. State Bar Ass'n. Bd. of Governors, Formal Op. No. 80, 1991 WL 279182 (1991); Pa. Bar Ass'n. Comm. on Legal Ethics and Prof'l Responsibility, Formal Op. 142, 1995 WL 929535 (Supp. 1995).

39. See N.C. State Bar, 97 Formal Ethics Opinion 2, 1997 WL 1015960 (1997).

40. *Id.*

41. *Id.*

42. Va. Legal Ethics Comm., Op. 1670 (1996).

43. Fla. St. Bar Ass'n. Comm. on Prof'l Ethics, Op. 88-14, 1989 WL 380139 (1989) (amended 1996).

Federal and Florida Rules of Evidence state that any former employee's ex parte statements "would not be admissible against the corporation."⁴⁴

In a rather lengthy but amazingly detailed and clear opinion, the Pennsylvania Bar Association outlined all of the potential problems and solutions in its decision to openly permit ex parte communications with former employees.⁴⁵ The Pennsylvania Bar Association noted that the majority of courts "take the position that Rule 4.2 does not apply to former employees" as long as the ex parte communications do not divulge the corporation's privileged information.⁴⁶ The Pennsylvania Bar Association agreed with that position and now permits communications with a corporation's unrepresented former employees under Rules 4.2 and 4.3.⁴⁷ The opinion further details the steps that a prudent lawyer should take in effecting a proper ex parte interview and gives lawyers the proper disclosure instructions to avoid the appearance of impropriety.⁴⁸ By not only fully explaining its position of permitting ex parte communications, but also by giving instructions on how to properly conduct the communications, the Pennsylvania Bar ended the type of confusion that now exists in South Carolina.

D. Prevailing Decisions from Other States

While ex parte communication with a former employee has been addressed by various state bar ethics committees, the issue has also been problematic for state courts faced with confusing standards and vague guidance. Although state courts have struggled with and issued inconsistent opinions concerning ex parte communications with former employees in the past, a growing majority of courts also concur with the ABA's 1991 ruling that Rule 4.2 does not apply to former employees.⁴⁹

In 1990, New York paved the way for permitting ex parte communications with former employees. In *Niesig v. Team I*⁵⁰ the New York Court of Appeals held that Model Code provision DR 7-104(A)(1) applies "only to current employees, not to former employees."⁵¹ The court noted that former employees are not parties contemplated under DR 7-104(A)(1), thus the employees did not require the protection of the rule.⁵² Concerning current employees, the court

44. *Id.*

45. See Pa. Bar Ass'n. Comm. on Legal Ethics and Prof'l Responsibility, Formal Op. 142, 1995 WL 929535 (1990).

46. *Id.*

47. *Id.*

48. *Id.* There is no ethical duty to avoid the appearance of impropriety, but basic professional responsibility encourages lawyers to do so. MODEL RULES OF PROF'L RESPONSIBILITY Canon 9 (1996).

49. See Robert. B. Fitzpatrick, *Ex Parte Communications with Current and Former Employees*, in ALI-ABA RESOURCE MATERIALS: EMPLOYMENT AND LABOR LAW (9th ed. 1999).

50. 558 N.E.2d 1030 (N.Y. 1990).

51. *Id.* at 1032. Substantively, DR 7-104 is identical to the current Model Rule 4.2.

52. *Id.* at 1035-36.

also struck down a blanket rule prohibiting all *ex parte* communications and rejected a control group rule forbidding communications with all controlling members of the corporation.⁵³ The court found the control group rule unfeasible because of the rule's lack of practicality.⁵⁴ After striking down these rules, the New York Court of Appeals realized that "[f]oreclosing all direct, informal interviews of employees of the corporate party unnecessarily sacrifices the long-recognized potential value of such sessions."⁵⁵

In 1997, in *H.B.A. Management, Inc. v. Estate of Schwartz*⁵⁶ the Supreme Court of Florida held that the "Florida Rule of Professional Conduct 4-4.2 . . . does not prohibit a claimant's attorney from engaging in *ex parte* communications with former employees of a defendant-employer."⁵⁷ For "neither Model Rule 4.2 nor its Florida counterpart, rule 4-4.2, extend the rules' prohibitions against contact with represented persons to former employees of defendant-employers."⁵⁸ These employees are not protected because they are no longer the organization's speaking agents who are able to bind the organization.⁵⁹ Former employees are essentially "free agents."⁶⁰ Therefore, any statements would not be binding against the corporation because of the employee's free-agency status.⁶¹ Finally, the court noted that "the whole tenor of the comment to rule 4-4.2 . . . indicates that the rule is concerned solely with current employees."⁶² Thus, *Schwartz* settles Florida's concerns about *ex parte* communications, permitting such contact with former employees "unless these individuals have maintained ties to the corporation (*e.g.*, litigation consultant) or are represented by counsel in the matter."⁶³

Missouri takes a similar stance: "An attorney can make *ex parte* contact without the consent of the organization's attorney for all former employees."⁶⁴ These statements cannot bind the former employer corporation because such statements do not constitute admissions.⁶⁵ Former employees may only bind their former employer "by their acts or omission while they were employed."⁶⁶ Alabama agrees and states that "contact with a former employee is ethically permissible, unless the *ex parte* contact is intended to deal with privileged

53. *Id.* at 1034.

54. *Id.* at 1035.

55. *Id.* at 1034.

56. 693 So.2d 541(Fla. 1997).

57. *Id.* at 542 (footnote omitted).

58. *Id.* at 544.

59. *Id.*

60. *Id.*

61. *See id.*

62. *H.B.A. Management*, 693 So.2d at 545.

63. Bernard H. Dempsey, Jr., *New Developments in the Law: Ex Parte Communications with Current and Former Employees of a Corporate Defendant*, FLA. B. J., Dec. 1997, at 20.

64. Garrett Hodes, *Ex Parte Contacts with Organizational Employees in Missouri*, J. MO. B., Mar.-Apr. 1998, at 86.

65. *Id.* at 85-86.

66. *Id.* at 86.

matter, . . . and these communications were conducted for purposes of advising the adverse party in the litigation or claim.”⁶⁷ Alabama takes this concept even further and permits communications with the former employee even if that employee gave rise to the current action.⁶⁸ In addition, the majority of the states in the Fourth Circuit openly permit ex parte communications with former employees.⁶⁹

Although many states do permit ex parte communications with former employees, South Carolina does not stand alone in its hesitant stance toward such contacts.⁷⁰ In 1990, New Jersey strictly prohibited all ex parte communications with both current and former employees.⁷¹ In *Public Service Electric & Gas Company v. Associated Electric & Gas Insurance Services, Ltd.* the court ruled that Rule 4.2 prohibits all contacts with all former employees because their statements and acts may be imputed to the corporation.⁷² However, in 1996, New Jersey relaxed its stance and embraced a more flexible standard concerning communications with former employees.⁷³ As amended, New Jersey Rule of Professional Conduct 1.13(a) limits ex parte conduct with former employees that had been members of the corporation’s control group.⁷⁴ However, these represented former employees may disavow their corporate representation at any time.⁷⁵ If and when a former employee disavows representation, the employee may speak freely against his former employer.⁷⁶ With this amendment, New Jersey has now moved closer to the growing nationwide standard of permitting ex parte communication with former employees.

67. J. Anthony McLain, *Rule 4.2 - Plaintiff's Counsel Contacting Former Employees of Corporate Defendant*, 60 ALA. L. REV. 420, 421 (1999).

68. *Id.*

69. Fitzpatrick, *supra* note 49, at 560 (recognizing that Maryland allows ex parte communication with former managers); *id.* at 575 (noting that Virginia allows ex parte communication with former officers or employees); *id.* at 578 (recognizing that West Virginia has adopted a balancing test which sometimes allows ex parte communication with former employees).

70. *Id.* at 547.

71. *See* Pub. Serv. Elec. & Gas Co. v. Associated Elec. & Gas Ins. Servs., Ltd., 745 F. Supp. 1037, 1039 (D.N.J. 1990).

72. *Id.*

73. *See* Donna duBeth Gardiner, *Former and Current Employees: The New Rules on Ex Parte Contacts*, N.J. LAW., Jan.-Feb. 1997, at 28; Amatzio v. Gandalf Sys. Corp., 932 F. Supp. 113, 118 (D.N.J. 1996) (holding that a former employee could reveal confidential information concerning the opposing corporate party to his personal attorney).

74. *See* Gardiner, *supra* note 73, at 28.

75. *Id.*

76. *Id.*

III. EX PARTE COMMUNICATIONS IN SOUTH CAROLINA

A. *South Carolina's Ethics Opinions*

Given the former vagueness and incorrect application of Evidence Rule 801(d)(2) and Rule 4.2, it is not surprising that no clear ethical guidelines for communicating with an opposing company's former employees exist today in South Carolina. For years South Carolina appeared to follow the national trend by gradually permitting some ex parte contact with former employees.⁷⁷ However, in 1997, the South Carolina Bar's Ethics Advisory Committee took an about-face in a controversial opinion precluding most ex parte communications.⁷⁸

South Carolina first addressed the issue of ex parte communications with former employees in 1991 when the Ethics Advisory Committee ruled that a lawyer representing a client in an action against a corporate party could hire a former employee of that opposing corporate party as a paralegal.⁷⁹ The Committee decided that the lawyer would not violate Rule 4.2 since "the paralegal had no decision-making role while employed by the corporation, possesse[d] no protected information, and [was] not likely to be called as a witness in the litigation."⁸⁰ The Ethics Advisory Committee further noted that Rule 4.2 did not preclude its decision because the official comments did "not directly purport to limit contact with any former employee of a corporate party."⁸¹

A year later, the Ethics Advisory Committee ruled that, in an investigation, a client's attorney may not contact certain former employees of an adverse party corporation.⁸² The Committee held that ex parte communications constitute ethical violations and that opposing counsel may have a duty to report the unethical conduct.⁸³ The opinion went on to draw distinctions between permissible and impermissible ex parte communications.⁸⁴ It suggested that permissible communications would include communications with two types of former employees: (1) those who were not cognizant of, or could not dispense, any privileged information; and (2) those who did not formally hold a decision-making position (control group position) with the corporation.⁸⁵ The

77. See S.C. Bar Ethics Adv. Comm., Formal Op. 12 (1991); S.C. Bar Ethics Adv. Comm., Formal Op. 31 (1992); S.C. Bar Ethics Adv. Comm., Formal Op. 25 (1994).

78. S.C. Bar Ethics Adv. Comm., Formal Op. 36 (1997).

79. S.C. Bar Ethics Adv. Comm., Formal Op. 12 (1991).

80. *Id.*

81. *Id.* (noting S.C. APP. CT. R. 407, R. 4.2).

82. S.C. Bar Ethics Adv. Comm., Formal Op. 31 (1992).

83. *Id.*; see also S.C. APP. CT. R. 407, R. 8.3(a) ("A lawyer having knowledge that another lawyer has committed a violation of the rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.")

84. S.C. Bar Ethics Adv. Comm., Formal Op. 31 (1992).

85. *Id.*

Ethics Advisory Committee ruled that former employees' acts that may have injured the client were imputed to and bound the corporation.⁸⁶ The Committee followed the official comment of Rule 4.2 that prohibits contact:

with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.⁸⁷

Therefore, pursuant to the official comment to Rule 4.2, the Ethics Advisory Committee found that such ex parte communications were prohibited.⁸⁸

However, in the 1992 decision, the South Carolina Bar Ethics Advisory Committee rejected a formal opinion rendered a year earlier by the American Bar Association Committee on Ethics and Professional Responsibility that adopted a tolerant view toward permitting opposing counsel's contact with former employees.⁸⁹ That ABA opinion stated that "[a] lawyer representing a client in a matter adverse to a corporate party that is represented by another lawyer may, without violating Model Rule 4.2, communicate about the subject of the representation with an unrepresented former employee of the corporate party without the consent of the corporation's lawyer."⁹⁰ The Ethics Advisory Committee took a more conservative approach, and only looked to Rule 4.2's text and official comment in rendering its decision.⁹¹

The Committee continued with its conservative approach in a 1994 opinion dealing with whether an attorney could contact the former employees of a defendant in a slip and fall case.⁹² The Committee reaffirmed its 1992 decision and limited such ex parte communications to situations where the employee's acts and statements could not be attributed to the corporation and the employee's actions played no part in the present action.⁹³ Thus, the former employees could not be interviewed if their actions could have caused the accident in question.⁹⁴ The decision also noted that Rule 4.2 "may apply more broadly in a slip and fall case in which notice is a significant issue and a

86. *Id.*

87. *Id.* (quoting S.C. APP. CT. R. 407, R. 4.2).

88. *Id.*

89. *See id.*

90. S.C. Bar Ethics Adv. Comm., Formal Op. 31 (1992) (quoting ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 359 (1991)).

91. *See id.* This section of the opinion lacks sufficient analysis, as neither Rule 4.2 or the Rules's official comments forbid ex parte communications with former employees.

92. S.C. Bar Ethics Adv. Comm., Formal Op. 25 (1994).

93. *Id.*

94. *See id.*

condition of liability,” and “[c]ontact may be allowed in other types of cases when the employee is an ‘observer’.”⁹⁵

The 1994 opinion noted that because “the profession has considered that the presumptively superior skills of the trained advocate should not be matched with those of one not trained in law,” the corporation’s former employees deserved the protection of Rule 4.2.⁹⁶ In forbidding opposing counsel from interviewing former employees, the Ethics Advisory Committee stressed the need to protect the attorney-client privilege. The decision also required all attorneys to abide by the requirements and official comment to Rule 4.3 when communicating with former employees.⁹⁷ The ruling also counseled lawyers contacting former corporate employees of the opposing party always to identify themselves, their client, and their role in the matter.⁹⁸ This formality allows former employees to fully understand the situation and to have the opportunity to refuse to talk to opposing counsel before obtaining their own attorney or the corporate attorney.⁹⁹

In rendering Opinion 25, the Ethics Advisory Committee looked to other jurisdictions’ decisions regarding the matter, ranging from New York’s holding that under no circumstances may a former employee’s communication impute their former employer corporation,¹⁰⁰ to New Jersey’s ruling that Rule 4.2 covers all former employees,¹⁰¹ to Montana’s decision that Rule 4.2 bars ex parte contacts only with former employees who had supervisory jobs that were related to the action in question.¹⁰² At that time, South Carolina decided to take a neutral, middle of the road position and barred only certain ex parte communications.¹⁰³

In 1997, the South Carolina Bar Ethics Advisory Committee made a radical departure from previous decisions and ruled that defendant corporation’s counsel could not communicate ex parte with plaintiff corporation’s former employees concerning breach of implied warranty and negligence claims.¹⁰⁴ The opinion concerned a hypothetical where the employee was a member of the corporation’s “control group.”¹⁰⁵ The

95. *Id.*

96. *Id.*

97. *Id.*; see also S.C. APP. CT. R. 407, R. 4.3 (inferring that when acting on behalf of a client, a lawyer must not give an unrepresented person any advice other than to seek counsel).

98. S.C. Bar Ethics Adv. Comm., Formal Op. 25 (1994).

99. *Id.*

100. S.C. Bar Ethics Adv. Comm., Formal Op. 25 (1994) (citing *Niesig v. Team I*, 558 N.E.2d 1030 (N.Y.1990)).

101. *Id.* (citing *Pub. Serv. Elec. & Gas Co. v. Associated Elec. & Gas Ins. Serv.*, 745 F. Supp. 1037 (D.N.J. 1990)). Note that New Jersey has since moved away from this rigid standard and now permits some ex parte communications. See Gardiner, *supra* note 73, at 28.

102. S.C. Bar Ethics Adv. Comm., Formal Op. 25 (1994) (citing *Porter v. Arco Metals*, 642 F. Supp. 1116 (D. Mont. 1988)).

103. *Id.*

104. S.C. Bar Ethics Adv. Comm., Formal Op. 36 (1997).

105. *Id.*

employee's acts while employed by the plaintiff were not negligent and did not give rise to the present action, but the employee could have injured the plaintiff's claim by potentially illustrating the plaintiff's contributory negligence.¹⁰⁶

The Committee's short opinion simply quoted the official comment to Rule 4.2 and stated, "The plain language of Rule 4.2 bars this ex parte contact with this former employee because of his past managerial responsibilities concerning the matter in litigation."¹⁰⁷ Because the former employee was a member of the corporation's control group, the employee's statements concerning contributory negligence may have bound or been imputed to the corporation.¹⁰⁸ However, the opinion failed to take into consideration South Carolina Rule of Evidence 801(d)(2), which specifically states that only current employees may impute their employer company.¹⁰⁹

In 1997, the South Carolina Bar Ethics Advisory Committee contradicted the earlier 1994 and 1992 decisions.¹¹⁰ In the Committee's 1994 opinion, the Committee specifically held that Rule 4.2 only prohibited contact "with former employees whose actions were alleged to be negligent on the subject matter of the representation."¹¹¹ The 1994 decision also noted, "When allegations addressed specifically to the acts or omissions of certain employees are imputed to the defendant, these restrictions should apply."¹¹² Therefore, the restrictions of Rule 4.2 only apply when the case specifically refers to the actions of an employee that may be imputed to the defendant company.¹¹³ The opinion implied that when the allegations are not specifically addressed to the acts of a former employee, the Rule 4.2 restrictions do not apply and ex parte communications are permitted.¹¹⁴

In addition, the Committee's comment states that the "plain language of Rule 4.2" bars ex parte contact because of "past managerial responsibilities."¹¹⁵ This language has been described as: "overbroad, unsupported and insupportable. The facts in question disclose no such 'managerial responsibilities' but rather negate their presence, since it is a given that neither the acts nor the statements of the former employee, while employed, would be adversely imputed to the company."¹¹⁶ Thus, under the precedent set by the

106. *Id.*

107. *Id.*

108. *See id.*

109. *See* S.C. R. EVID. 801(d)(2).

110. *See* S.C. Bar Ethics Adv. Comm., Formal Op. 36 (1997).

111. S.C. Bar Ethics Adv. Comm., Formal Op. 25 (1994) (citing S.C. Bar Ethics Adv. Comm., Formal Op. 31 (1992)).

112. *Id.* (citing ABA Comm. on Ethics and Prof'l. Responsibility, Formal Op. 359 (1991)).

113. *Id.*

114. *Id.*

115. S.C. Bar Ethics Adv. Comm., Formal Op. 36 (1997).

116. John Freeman, *Former Employees May be Interviewed Ex Parte (Usually)*, S.C. LAW. May/June 1998, at 11.

1992 and 1994 opinions, the former employee should have been free from Rule 4.2's ex parte communications restrictions.

In 1998, the South Carolina Bar Ethics Advisory Committee reversed its harsh treatment of ex parte communications and returned to its previous position of allowing the communications in certain circumstances in Opinion 98-19.¹¹⁷ The opinion addressed a situation where a plaintiff's attorney desired to speak with a former employee of a corporation; the attorney knew that the employee had retained personal counsel, but was not aware of the counsel's identity.¹¹⁸ The Committee held that the plaintiff's attorney could "communicate with the former employee for the sole purpose of obtaining the name of the former employee's personal counsel."¹¹⁹ In this situation, the plaintiff's attorney did not need to inform the corporation of any communications because the "[f]ormer employee's prior status with the corporation is not germane to the analysis as any statements made by the former employee would not be binding admissions nor the basis of imputed liability to the corporation."¹²⁰

Although the situation in the 1998 opinion differs from the situations addressed by previous opinions because the former employee had personal counsel and the opposing attorney conducted only a limited communication, permitting ex parte communications with former employees had a drastic effect.¹²¹ Rule 4.2 only prohibits communications with persons "whose act[s] or omission[s] may be imputed to the organization."¹²² Earlier ethics opinions held that former employees' statements may still impute their former employer.¹²³ However, Opinion 98-19 made sweeping strides in permitting communications because this opinion favorably cited ABA Formal Opinions 91-359 and 95-396.¹²⁴ These well-followed opinions permit all ex parte communications with former employees, except those communications aimed to divulge confidential information.¹²⁵ In addition, the Committee correctly interpreted and favorably cited South Carolina Rule of Evidence 801(d)(2) realizing that "any statements made by [a] former employee would not be binding admissions."¹²⁶ Since a former employee cannot presently hold managerial responsibility with the corporation, and her statements cannot bind the corporation, the employee is exempted from the restrictions of Rule 4.2. Thus, pursuant to South Carolina Bar Ethics Advisory Committee Opinion 98-

117. S.C. Bar Ethics Adv. Comm., Formal Op. 19 (1998).

118. *Id.*

119. *Id.*

120. *Id.* (citing S.C. R. EVID. 801(d)(2)(B) and FED. R. EVID. 801(d)(2)(B)).

121. *Id.*

122. S.C. App. Ct. R. 407, R. 4.2.

123. *See, e.g.*, S.C. Bar Ethics Adv. Comm. Formal Op. 31 (1992) (applying Rule 4.2 to former employees).

124. *See* S.C. Bar Ethics Adv. Comm., Formal Op. 19 (1998).

125. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 359 (1991); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 396 (1995).

126. S.C. Bar Ethics Adv. Comm., Formal Op. 19 (1998).

19, opposing counsel may apparently communicate with a defendant company's former employees.

B. Conducting a Proper Ex Parte Communication

After analyzing the South Carolina Bar Ethics Advisory Committee's decisions concerning ex parte communications with former employers, how should a lawyer conduct an ex parte communication with an opposing party's former employee considering that the guiding ethics opinions are varied, inconsistent, and unclear?¹²⁷ South Carolina has a deficit of substantive case law concerning this subject.¹²⁸ However, some lower courts in unpublished opinions have expounded on the topic.¹²⁹ In a 1995 decision, Judge David H. Maring, Sr. of the Fifteenth Circuit of South Carolina held that "Rule 4.2 does not prohibit ex parte communications with former agents and employees of an adverse corporate party who are not members of the adverse corporate party's control group at the time of the ex parte communication."¹³⁰ Judge Maring held that a former employee of a corporation who held a non-control-group position was not made a party to the litigation, and had not retained personal legal counsel, was "not, in his own right, a party represented by another lawyer in the matter within the purview of Rule 4.2."¹³¹ In analyzing Rule 4.2, Judge Maring stated that Rule 4.2 should not be "expansively interpreted" to prohibit all ex parte communications with a corporation's former employees.¹³² Therefore, at least one of the few available opinions reveals that South Carolina courts follow the more liberal attitudes expressed by the ABA, other states, and the South Carolina Bar Ethics Advisory Committee's 1994 and 1998 decisions.

Even though it is now clear that some ex parte communications with former employees are permitted in South Carolina, the lack of clear rules for attorneys to follow further confuses the issue. In the 1994 Ethics Opinion 94-25, the Committee implicitly laid out some rules for contact with former

127. See *supra* Part II.A.

128. To date, no South Carolina Supreme Court or Court of Appeals' decision has interpreted South Carolina's stance on ex parte communication with former employees.

129. See *Goldston v. Gen. Motors Acceptance Corp.*, No. 93-CP-26-740, slip op. (S.C. Ct. Com. Pl. July 14, 1995).

130. *Id.* at 15-16.

131. *Id.* at 15.

132. *Id.* Judge Maring denied opposing counsel's motion to disqualify plaintiff's attorneys because they did not violate either Rule 4.2 or 4.3, and the plaintiff's attorneys' actions were proper and would not cause the defense to suffer actual prejudice. *Id.* at 13-18. The Judge stated that the plaintiff's attorneys' actions in soliciting affidavits in their investigation of the case "were entirely appropriate in light of [one of the plaintiff's attorneys] ethical obligation to act with reasonable diligence in representing the plaintiff." *Id.* at 21. Also, "the interests of justice will not be served by fashioning a remedy for an alleged ethical violation which only serves to prevent rather than assist the discovery of the truth." *Id.*; see also *Brown v. Bi-Lo, Inc.*, No. 3215, 2000 WL 959492 at *3 n.14 (S.C. Ct. App. 2000) (stating that "[a]bsent a privilege no party is entitled to restrict an opponent's access to a witness").

employees.¹³³ The opinion stated that opposing counsel should not “induce the former employee to violate any privilege attaching to attorney-client communications.”¹³⁴ Also, the lawyer initiating the contact “must make clear the nature of the lawyer’s role in the matter, including the identity of the lawyer’s client and the fact that the witness’s former employee is an adverse party.”¹³⁵ Opinion 98-19 further provided that opposing counsel should communicate in writing with a former employee to learn the identity of the employee’s personal counsel.¹³⁶

However, these opinions provide prudent attorneys insufficient instructions on how to best initiate and conduct a proper ex parte communication. In *Goldston*, Judge Maring favorably cited *In re Domestic Air Transportation Antitrust Litigation*.¹³⁷ In *In re Domestic Air Transportation* a Georgia federal court required the defendant airlines to provide information concerning former employees so the plaintiffs could properly conduct ex parte interviews with these employees.¹³⁸ The court did not require the plaintiffs to notify the defendant airlines of the upcoming interviews nor did it require the defendants to have counsel present to represent their former employees.¹³⁹ However, the court required the plaintiffs to adhere to Rule 4.3 and stated:

[P]rior to making any ex parte contact with former employees of the defendant airlines, plaintiffs must deliver to the former employee a letter informing her of the nature of the lawyer’s role in the matter giving occasion for the contact, including the identity of the lawyer’s client and the fact that the witness’s former employer is an adverse party. Counsel must also inform the former employee that she has no obligation to talk with plaintiff’s counsel. The Court will not require, as requested by defendants, that the letter include the name, address, and telephone number of the relevant corporate defendant’s counsel.¹⁴⁰

Prudent attorneys should consider following the guidelines in *In re Domestic Air Transportation* and take the same precautions when conducting an ex parte

133. S.C. Bar Ethics Adv. Comm., Formal Op. 25 (1994).

134. *Id.*

135. *Id.* (citation omitted).

136. S.C. Bar Ethics Adv. Comm., Formal Op. 19 (1998).

137. See *Goldston v. Gen. Motors Acceptance Corp.*, No. 93-CP-26-740, slip op. at 16 (S.C. Ct. Com. Pl. July 14, 1995) (citing *In re Domestic Air Transp. Antitrust Litig.*, 141 F.R.D. 556 (N.D. Ga.1992)).

138. See *In re Domestic Air Transp. Antitrust Litig.*, 141 F.R.D. 556, 562 (N.D. Ga. 1992) (granting plaintiff’s motion to compel American Airlines, United Airlines, USAir, and Delta Airlines to provide information concerning former employees, expense reports, and other important documents concerning the government’s investigation of airline fares and practices).

139. *Id.*

140. *Id.*

interview. A letter, such as the one outlined above, sent to the former employee defining the situation gives the employee the opportunity to understand her rights, educates her on the reason for the interview, and enables her to obtain optional personal legal counsel. Because the letter does not require the naming of the opposing corporate counsel, the former employee will not feel forced to contact opposing counsel, but will instead be able to make an independent decision about whether to speak to opposing counsel. The attorney also needs to advise the former employee that the attorney is not interested in information protected by the employee's fiduciary duty (attorney-client privileged information).¹⁴¹ Thus, before initiating an ex parte communication with a former employee of the opposing party, a prudent attorney should first notify the former employee in writing to fully disclose the attorney's position, the attorney's responsibilities to the client, and the attorney's responsibilities to the former employee.

C. Recommendations for the Future

Although attorneys would be wise to follow the guidelines set forth above, South Carolina has yet to explain why the state remains in the minority of jurisdictions still qualifying the instances in which ex parte communications with unrepresented former employees are permitted. South Carolina should take heed of other states' actions and join the ever growing number of states that adhere to ABA Committee Opinion 91-359.¹⁴²

First, South Carolina should adopt the reasoning set forth in *Niesig v. Team I* and eliminate all remnants of the control group rule.¹⁴³ In corporate cases where incidents giving rise to the cause of action occurred years ago, attorneys often have difficulty accurately determining who were the members of a company's control group.¹⁴⁴ Further, in large corporations, who are the members of the control group? Does the group consist of only members of the board of directors or does it extend down into middle and lower management? The control group standard is impractical because there is no clear legal definition of a control group.¹⁴⁵ Because of the practical problems associated with determining the members of the control group, South Carolina should simply discontinue its use.

Secondly, South Carolina should permit communications with all former employees because former employees cannot possibly bind or impute their former employer corporation.¹⁴⁶ Former employees are "free agents," and as such, they are not committed to their former employer; therefore, they cannot

141. Freeman, *supra* note 116, at 12.

142. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 359 (1991).

143. *Niesig v. Team I*, 558 N.E.2d 1030 (N.Y. 1990).

144. See *id.*

145. See *id.* at 1035 (acknowledging the "practical and theoretical problems posed by the 'control group' test").

146. See S.C. R. EVID. 801; S.C. Bar Ethics Adv. Comm., Formal Op. 19 (1998).

bind their former employer.¹⁴⁷ Thus, any statements made by former employees are of their own accord and should not be attributable to their former employer. South Carolina should adopt this “free agency” standard and realize that former employees consider themselves “free” of their former employer’s restraints; therefore, they should also be “free” from their former employer’s corporate counsel. In addition, South Carolina should follow Alabama’s example and abandon its 1994 opinion that prohibits contact with former employees whose conduct gave rise to the cause of action.¹⁴⁸ Because the former employee becomes a free agent after the employment ends, any statement or action by that employee would be the employee’s own and not imputable to the corporation.

Ordinarily, nothing prevents an individual who has information relevant to a case from speaking to attorneys on either side. However, if the individual has information because of his former employment, suddenly he is forbidden from assisting both sides of the action. Somehow this technique only seems to protect one side’s interests and sets up more impediments in the investigation for the truth.

If South Carolina insists on maintaining restrictions on ex parte contacts with former employees, the State should consider adopting New Jersey’s “disavowing” technique.¹⁴⁹ Under that approach, a represented former employee may individually make the decision whether to keep the representation and protection of her former employer or to give up counsel and speak freely with opposing counsel. In essence, the disavowing technique allows the employee, not the employer, to control the situation. Disavowing also promotes access to all potential witnesses and makes the playing field a bit more level for individual plaintiffs while still maintaining a great deal of protection for the corporation.

Finally, South Carolina currently extends the protections afforded by Rule 4.2 to former employees because trained advocates—corporate counsel—may better protect the employees from the action’s potential harm than the employees can protect themselves.¹⁵⁰ The South Carolina Bar Ethics Advisory Committee explicitly prohibits unrestricted ex parte communication with former employees because the communication would break the attorney-client privilege and harm the employee.¹⁵¹ However, the State can still protect the attorney-client privilege and permit ex parte communications with former employees. The State should rely on Rule 4.3 and Rule 4.4 to protect these employees. Rule 4.3 instructs lawyers on how to properly deal with unrepresented clients.¹⁵² Unless the former employee has her own private counsel, the employee is considered unrepresented because when she left her

147. See *H.B.A. Managment, Inc. v. Estate of Schwartz*, 693 So.2d 541, 544 (Fla. 1997).

148. See *infra* notes 67-68 and accompanying text.

149. See *infra* notes 74-76 and accompanying text.

150. See S.C. Bar Ethics Adv. Comm., Formal Op. 31 (1992).

151. See S.C. Bar Ethics Adv. Comm., Formal Op. 25 (1994).

152. See MODEL RULES OF PROF’L CONDUCT R. 4.3 (2000).

job, she also left the corporate counsel's representation that came with the job. Therefore, Rule 4.3 will still protect the employee. Rule 4.4 will also protect corporate counsel because opposing counsel may not use her access to former employees to burden or violate the legal rights of the corporation.¹⁵³ If corporate counsel believes that an ethics violation has occurred in opposing counsel's ex parte communications, corporate counsel may still seek relief under Rule 4.3 and Rule 4.4.¹⁵⁴ Thus, South Carolina may still meet its primary goal to zealously protect the privileges of former employees without categorizing the employees as represented persons under Rule 4.2.

IV. CONCLUSION

Currently, the South Carolina Bar Ethics Advisory Committee is undecided on whether to permit ex parte communications with former employees. The Committee's 1998 opinion appeared to have finally opened the door for such communications, but unfortunately, the opinion still does not plainly endorse ex parte communications with former employees. Without a recent upper level case discussing these communications, the issue remains veiled in mystery. South Carolina should abandon the subjective, illogical, and undefinable control group standard. The State should realize that the federal and state rules of evidence prevent former employees' statements from ever imputing their former corporate employers. Therefore, South Carolina should follow the current trend and permit ex parte communications as outlined in the ABA's 1991 opinion.¹⁵⁵ South Carolina should embrace this opportunity to clarify this issue and eliminate its implicit endorsement of corporate counsel's habit of inhibiting a plaintiff from obtaining necessary information concerning her case.

Sharyn M. Epley

153. See MODEL RULES OF PROF'L CONDUCT R. 4.4 (2000).

154. See *id.*; MODEL RULES OF PROF'L CONDUCT R. 4.3 (2000).

155. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 359 (1991).

*